DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
941 North Capitol Street, NE, Suite 9100
Washington, D.C. 20002
TEL: (202) 442-8167
FAX: (202) 442-9451

D. B. S. C. Appellant/ Employer, v. C. R. Appellee/Claimant.	Case No.: ES-P-07-107582

FINAL ORDER

I. INTRODUCTION

This is an appeal by Employer ("D.B.I.D.") of a Claims Examiner's Determination certified as served on June 4, 2007, holding Claimant eligible for unemployment benefits. The issue on appeal is whether Appellee/Claimant C. R. was discharged for "misconduct," as that term is defined in the District of Columbia Unemployment Compensation Act, D.C. Code, 2001 Ed. § 51-110(b), and 7 District of Columbia Municipal Regulations ("DCMR") 312.

This administrative court issued a Scheduling Order on July 10, 2007, scheduling the hearing for July 27, 2007, at 10:30 a.m. Claimant represented herself at the hearing and testified on her own behalf. D.B.I.D. was represented by Charles Ray, Esq. of the District of Columbia Chamber of Commerce Employer Advocacy Program. B. R., Supervisor, and E. S., Director of Operations, testified on behalf of D.B.I.D. During the hearing, I admitted D.B.I.D.'s exhibits

101, 102, 108, and 109 into evidence. I relied on Court records 300 and 301 to determine jurisdiction.

II. FINDINGS OF FACT

1. The Claims Examiner's Determination is certified as having been served on June 4, 2007.[1] D.B.I.D. filed its Request for a Hearing on June 13, 2007.

2. D.B.I.D. is a non-profit organization that "enhances" a 140-160 block area of downtown Washington, DC. Among its functions, D.B.I.D. deploys "Clean and Safe" teams that meet and greet people on the streets, act as the eyes and ears for the Metropolitan Police Department, and clean a specific area or zone. Claimant was a Zone Cleaner. As such, she was responsible for cleaning the curb line and tree boxes in a specified four-to-six block zone. Claimant was employed from February 15, 2001, until November 6, 2006.

3. On August 24, 2006, Claimant was given a two-day suspension because of time and attendance problems. Exhibit 102. D.B.I.D. noted that Claimant's time and attendance problems were associated with "personal issues surrounding her children which has required her to be home on an emergency basis." Exhibit 102. Claimant is the single mother of two children. During the month of August 2006, Claimant had no child care and was unable to find child care for her children who were displaying behavioral problems.

4. On November 1, 2006, Claimant was given a disciplinary warning because she had been absent five days over the preceding thirty days (October 12, 23, 27, 30 and 31, 2006). Exhibit 108. At least one of these days (October 27, 2006), Claimant had failed to call to report

[1] Nothing in the record below indicates any issue has been raised or preserved concerning factors under D.C. Code, 2001 Ed. § 51-109 such as base period eligibility, availability for work.

her absence. Exhibit 108. During this same period, Claimant was tardy eight times (October 4, 5, 10, 17, 20, 24, 25 and 26, 2006). Exhibit 108. On November 3, 2006, Claimant did not report to work or call D.B.I.D. to explain her absence. Exhibit 109.

5. At some point in time prior to October 27, 2006, Claimant's home telephone was disconnected. During all of October and into November 2006, Claimant's children were significantly disruptive at school. All of Claimant's tardiness and absences during October and November 2006, were the direct result of Claimant responding to the complaints of her children's schools.

6. On November 13, 2006, Claimant was terminated effective November 6, 2006, because of excessive tardiness and absences, including Claimant's failure to call in to report her absence on two occasions. Exhibit 101.

III. DISCUSSION AND CONCLUSIONS OF LAW

In accordance with D.C. Code, 2001 Ed. § 51-111(b), any party may file an appeal from a Claims Examiner's Determination within ten calendar days after the mailing of the Determination to the party's last-known address or, in the absence of such mailing, within ten calendar days of actual delivery of the Determination. The Determination in this case is certified as having been served on June 4, 2007. Thus, all appeals had to be filed no later than June 14, 2007. D.B.I.D.'s appeal request was filed with this administrative court on June 13, 2007. The appeal was timely filed and jurisdiction is established. D.C. Code, 2001 Ed. § 51-111(b).

In the District of Columbia, generally an unemployed person who meets certain statutory eligibility requirements is qualified to receive benefits. D.C. Code, 2001 Ed. § 51-109. The law,

however, creates disqualification exceptions to the general rule of eligibility. The burden is on the employer to establish an exception for an employee who would otherwise be eligible for unemployment insurance benefits under D.C. Code, 2001 Ed. § 51-109. If an employee has been discharged for misconduct occurring in her most recent work, the employee is disqualified from receiving benefits. D.C. Code, 2001 Ed. § 51-110(b). The burden is on the employer to show that the employee has engaged in misconduct. 7 DCMR 312.2 (the party alleging misconduct has the responsibility to present evidence of misconduct); *McCaskill v. D.C. Dep't of Employment Servs.*, 572 A.2d 443, 446 (D.C. 1990). Before unemployment benefits may be denied in misconduct cases, there must be a finding of misconduct "based fundamentally on the reasons specified by the employer for the discharge." *See Chase v. D.C. Dep't of Employment Servs.,* 804 A.2d 1119, 1123 (D.C. 2002) (internal citation omitted).

Claimant was terminated for misconduct as she was repeatedly absent or tardy following written warnings.[2] The governing regulations define the term "gross misconduct" as:

> an act which deliberately or willfully violates the employer's rules, deliberately or willfully threatens or violates the employer's interests, shows a repeated disregard for the employee's obligation to the employer, or disregards standards of behavior which an employer has a right to expect of its employee.

7 DCMR 311.3. Pursuant to 7 DCMR 312.4(k), such misconduct may include "repeated absence or tardiness following warning."

The Court of Appeals has noted, "implicit in this court's definition of 'misconduct' is that the employee intentionally disregarded the employer's expectations for performance. . . .The fact that an employee's discharge appears reasonable from the employer's perspective does not

[2] Mr. S.'s testified that Claimant was fired simply because she had failed to report for work or call in to explain her absence on two occasions (October 27 and November 3, 2006). However, all the other evidence presented by D.B.I.D. establishes that it fired Claimant because of her overall time and attendance problems, including but not limited to the two times she failed to go to work or call in.

necessarily mean that the employee engaged in misconduct." *The Washington Times v. D.C. Dep't of Employment Servs.*, 724 A.2d 1212, 1217-1218 (D.C. 1999). In this case, all of the evidence presented by D.B.I.D., including Mr. S.'s testimony, established that Claimant's time and attendance problems were directly related to the problems she was having with her children. Exhibit 102. Further, the unrefuted, credible testimony of Claimant was that her lack of telephone service explains the two occasions that she did not call in to report her absence.[3]

The District of Columbia Court of Appeals has ruled that "[a]ttendance at work is an obligation which every employee owes to his or her employer, . . ." *Shepherd v. D.C. Dep't of Employment Servs*., 514 A.2d 1184, 1186 (D.C. 1986). However, other courts have noted that time and attendance problems have to be without "good cause" to constitute misconduct and preclude the receipt of unemployment compensation benefits. *Gardiner v. Arizona Department of Economic Security*, 127 Ariz. 603, 623 P.2d 33, 36 (the relevant "statute follows the general principle that persistent or chronic absenteeism or tardiness *without good cause*, especially if continued after warnings by the employer, constitutes willful misconduct and precludes payment of unemployment benefits upon discharge") (emphasis added).[4] Additionally, in Louisiana, a court of appeals has noted that:

> All of the evidence points to the conclusion that most of Ms. Harris' attendance problems, which were not extremely frequent, were caused by health problems, by her having an unreliable car and a long commute and by her being a single parent with a young child. There is neither any direct evidence that Ms. Harris' absences or lateness were intentional nor any circumstantial evidence from which such intent could be inferred.

[3] While I credit Claimant's testimony in this regard, and D.B.I.D. presented no evidence to contradict Claimant's testimony, I note that Claimant did manage to call D.B.I.D. during the time that she reported not to have telephone service. Exhibit 108. However, this does not necessarily belie her testimony regarding telephone service and her inability to call on the two days in question.

[4] *Gardiner*, 127 Ariz. 603 is cited with apparent approval by the D.C. Court of Appeals in *Shepherd*, 514 A.2d at 1186.

Harris v. Houston, 1998 La. App. LEXIS 3350, 722 S.2d 1042, 1045-1046.

Thus, in *Harris*, *supra*, the Louisiana Court of Appeals determined that a claimant's time and attendance problems which are predicated upon, among other things, the responsibility of being a single parent, does not constitute misconduct. In the present case, the parties agree that the only reason Claimant had time and attendance problems was because of the challenge of her being a single parent of children who were presenting significant behavioral problems at home and at school. In other words, Claimant, while repeatedly late or absent after warning from her employer, was not "intentionally disregard[ing] the employer's expectations for performance." *The Washington Times*, 724 A.2d at 1217. Quite the contrary, Claimant was fulfilling her legal responsibility as a parent. Further, when the frequency of Claimant's time and attendance problems is analyzed over the course of her over five years of employment with D.B.I.D., Claimant did not have "extremely frequent" attendance problems, which may undercut her claim for unemployment benefits. *Harris, supra.*

Therefore, I conclude that D.B.I.D. has failed to prove by a preponderance of evidence that Claimant's behavior constituted misconduct (gross or other than gross). Claimant is eligible for unemployment compensation benefits.

IV. ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is, this 1st day of August 2007

ORDERED that the Determination of the Claims Examiner that Appellee/Claimant C. R. is ineligible for benefits is **REVERSED**; it is further

ORDERED that Appellee/Claimant C. R. is **ELIGIBLE** for benefits; it is further

ORDERED that the appeal rights of any person aggrieved by this Order are stated below.

August 1, 2007

/S/
Jesse P. Goode
Administrative Law Judge